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In the Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT
VACATIONS U.S.A., LTD.
Petitioner

vs.

HARVEY G. MORTS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

I. Does traditional admiralty jurisdiction exist over a collision between a commercial service vessel and a houseboat occurring on the Lake of the Ozarks?

A. Should the Eighth Circuit be instructed to follow Supreme Court precedent on "navigability?"

B. In the face of contrary Legislative statements, can the Eighth Circuit restrict the jurisdiction of the federal courts solely because of actions of the Executive Branch explicitly not intended to restrict federal jurisdiction?

C. Should the conflict between the circuits on the requirement of "potential" versus "actual" navigability for admiralty jurisdiction be resolved to require only "potential" navigability?

II. Do alternate jurisdictional bases, outside traditional admiralty jurisdiction, exist which permit a federal court to address a vessel owner's rights under the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*)?

A. Should federal jurisdiction related to the Limitation of Liability Act (46 U.S.C. Appx. §§181 *et. seq.*) specifically granted by the Congress be broadly construed?

B. Does *Richardson v. Harmon*, 222 U.S. 96 (1911) recognize a jurisdictional basis for a federal court to handle a limitation action involving an accident not within the admiralty jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., and the respondents, Harvey G. Morts, Barbara Marlene Wilkerson, Clefford Dean Morts, Terry Gene Morts, Fred R. Greenburg, Frances V. Greenburg, Karron Lee Webb, Heather Webb, Holly Webb, Sharon Rice, and E. Keith Rice. The respondents in this Court are identical to the respondents below.

The parent companies of petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., are Entrepreneur Enterprises, Inc., Rannor Holding Corp, and Ideas Unlimited, Inc. Three Buoys Houseboat Vacations U.S.A., Ltd. has no affiliates or subsidiaries other that wholly owned subsidiaries.

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VACATIONS U.S.A., LTD.
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

Petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd. prays for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eighth Circuit entered on December 21, 1990, or for a summary reversal of the Eight Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 921 F.2d 775 (8th Cir. 1990) and is reprinted in the Appendix, pages A-1 through A-10. (Reference to the Appendix will hereafter be simply by page number).

The Order and the Memorandum decision of the United States Court for the Eastern District of Missouri (Nangle, C.J.) are reported at 689 F.Supp. 958 (E.D. Mo. 1989) (A-26, A-27 through A-37).

JURISDICTION

Three Buoys filed a Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Eastern District of Missouri on January 26, 1988, under the Limitation of Liability Act, 46 U.S.C.Appx. §§181 *et seq.*, (A-40 through A-41) and 28 U.S.C. §§1331, 1333 and 1337. (A-39). On June 27, 1988 the district court dismissed the Complaint for lack of subject matter jurisdiction and for failure to state a claim under the Limitation of Liability Act. Three Buoys timely appealed to the Eighth Circuit which affirmed the district court on July 5, 1989. Its first decision is reported at 878 F.2d 1096 (8th Cir. 1989) (A-11 through A-24). Three Buoys' Petition for Rehearing or, Rehearing *en banc* was denied on October 4, 1989, Judge McMillian voting to grant the Petition for Rehearing *en banc.* (A-25).

Three Buoys petitioned for certiorari which was granted. In *Three Buoys Houseboats Vacations U.S.A., Ltd. v. Morts,* 497 U.S. ____, 110 S.Ct. 3625 (1990), this Court vacated the Eighth Circuit's judgment and remanded the case for further consideration in light of *Sisson v. Ruby,* 497 U.S. ____ (1990). On remand, the Eighth Circuit did not alter the result of its earlier opinion in its decision reported at 921 F 2d 775 (8th Cir. 1990). (A-1 through A-10).

Three Buoys invokes the jurisdiction of the Court to review the judgment of the Eighth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional Provisions and Statutes involved are listed in the Table of Authorities and set forth in the Appendix at pages A-38 through A-45.

STATEMENT OF THE CASE

This case concerns whether an act of the Executive Branch should be construed by the Judicial Branch to divest the United States of Jurisdiction granted by the Legislative Branch. Specifically, should a court deny to a commercial vessel owner such as Three Buoys those rights granted by the Limitation of Liability Act to other commercial shipping operators simply because the Executive Branch, through FERC, has allowed a temporary obstruction to a navigable waterway, the Osage River?

On June 28, 1990, this Court vacated the Eighth Circuit's earlier opinion and remanded the matter "for consideration in light of *Sisson v. Ruby*, 497 U.S. ____ (1990)." The Eighth Circuit found no guidance in *Sisson* and rejected the spirit, if not the letter, of this Court's ruling that admiralty jurisdiction is to be liberally construed to protect commercial shipping.

In addressing *Sisson*, this Court specifically requested briefing and argument of whether this Court should reconsider *Richardson v. Harmon*, 222 U.S. 96 (1911). *Sisson v. Ruby*, 497 U.S. ____ (Order of January 22, 1990). This Court did not have the opportunity to address this issue in *Sisson*, because the issue was mooted by the clear existence of admiralty jurisdiction. This case provides the Court with the opportunity to address this issue of specific concern to the Court one year ago.

On August 2, 1987, a Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) commercial service vessel collided with a houseboat on the Lake of the Ozarks while returning from a commercial service job. The accident occurred in the course of maritime service: the service vessel was returning from towing another vessel to a safe mooring. The accident occurred in the course of navigation: the service vessel was underway and collided with another vessel adrift in the channel. The accident occurred in the course of a commercial operation, and the allegations against Three Buoys suggest that the negligent operation of the service vessel presented a hazard to maritime commerce. The accident was allegedly caused either by the failure of the drifting vessel to display proper lighting or the failure of the service vessel to obey the uniform Rules of the Road governing navigation.

In excess of four million dollars ($4,000,000.00) of claims were filed against Three Buoys. Three Buoys is a corporation whose business is the purchase, charter and service of vessels. Three Buoys filed its Petition for Exoneration from or Limitation of Liability for damages arising from this collision allegedly caused by the navigational errors of the Three Buoys' vessel operator.

The Lake of the Ozarks is a body of water wholly within the State of Missouri formed by the impoundment of the Osage River, an historically navigable tributary of the Missouri River, by the Bagnell Dam. The Executive and Legislative Branches of the United States have continuously recognized the navigable quality of this waterway and its direct implication of federal interests. All pertinent federal authority issuing from these two branches of the Federal Government show consistent recognition of the federal interest in these waters. Only the Judicial Branch, through this decision, has rejected the federal interest in

this waterway.

Union Electric Company, a private utility company, was authorized by the Army Corps of Engineers to build and operate the Bagnell Dam, a lockless hydroelectric dam, pursuant to a license issued by the Federal Energy Regulatory Commission (FERC). The FERC license specifically reserves to the United States the right to require the removal of the dam, the right to construct necessary facilities for navigation, the right to use all water necessary for navigation, and the right to terminate the license. The license specifically declares that the Osage River is a navigable waterway of the United States affecting the interests of interstate or foreign commerce.

The Osage River is and was navigable in fact above and below the Bagnell Dam. (A-15; A-35). Congress has declared that the waterway is navigable far upriver of the accident site. *See*, 33 U.S.C. §41. (A-39). The Lake of the Ozarks is capable of sustaining commercial navigation because of its size. (A-15). Commercial navigation takes place on the Lake of the Ozarks by the carriage of passengers and goods for hire. The United States Coast Guard inspects passenger excursion vessels and has agreed to allow the State of Missouri to exercise primary policing of activities on the Lake. The United States Army Corps of Engineers retains authority to permit any obstruction to navigation on the Lake.

Three Buoys' Complaint invoked the Limitation of Liability Act, 46 U.S.C.Appx. §§181 *et seq.*, the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, 28 U.S.C. §§1331, 1333, 1337, and Rule 9(h) of the Federal Rules of Civil Procedure. Several claimants answered and moved to dismiss the suit. The Motions were granted on June 27,

1988 for lack of subject matter jurisdiction and for failure to state a claim under the Limitation Act. The district court held that no admiralty jurisdiction existed solely because the Lake of the Ozarks is *presently* incapable of sustaining interstate commercial shipping. The district court correctly found jurisdiction under 28 U.S.C. §§1331 and 1337, as a claim under the Limitation Act arises under a federal statute affecting commerce. (A-35) However, the court mistakenly assumed that the Limitation Act applied only to torts occurring on navigable waters under its limited admiralty definition. (A-36). Although the Limitation Act was extended in 1886 to expressly include "all vessels used on lakes, rivers or in inland navigation . . ." (46 U.S.C.Appx. §188) (A-40 through A-41), the district court limited this statute to read, in effect, "all vessels used within the admiralty and maritime jurisdiction." In Three Buoys' view, this judicial rewriting of Congressional statement is incorrect and not only shows a disregard for the proper apportionment of powers and responsibility within the three branches of the federal government, but also conflicts with this Court's decision in *Richardson*.

Three Buoys appealed to the Eighth Circuit which affirmed the dismissal of the Limitation and went further to reverse the district courts' holding that jurisdiction existed. The Eighth Circuit inexplicably stated that a Limitation Action is akin to a state law defense which did not arise under a federal statute. (A-16 through A-17). The Eighth Circuit refused to recognize the federal nature of either the limitation action or the Lake of the Ozarks. The Eighth Circuit held that "contemporary navigability in fact" or present interstate or international commercial shipping must exist for a valid limitation action to proceed. Under this decision, any closing of interstate navigation is presumably sufficient to reject admiralty jurisdiction. The decision gave no consideration to the exclusive activity of

Three Buoys, commercial shipping and chartering, in evaluating admiralty jurisdiction. Three Buoys, a commercial chartering operation, is, in the view of the Eighth Circuit, not entitled to the same protection or uniformity of treatment of other commercial shipping operations solely because FERC has temporarily authorized an obstruction to the Osage River.

Three Buoys petitioned this Court for relief which was granted on June 28, 1990, when this Court vacated the Eighth Circuit's decision and remanded the matter for consideration in light of this Court's opinion in *Sisson. Three Buoys,* 479 U.S. ____, 110 S.Ct. 3265 (1990).

On remand, rather than recognize the spirit of this Court's ruling in *Sisson,* Eighth Circuit simply reapplied its limited view of federal interest in the Limitation Act and the Lake of the Ozarks. Since this Court's opinion in *Sisson* did not specifically overrule *Livingston v. United States,* 627 F.29 165 (8th Cir. 1980) (a result not required in *Sisson*) the Eighth Circuit found no overpowering reason to change its view.

Three Buoys now prays for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eighth Circuit entered on December 21, 1990, or for a summary reversal of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I. Does traditional admiralty jurisdiction exist over a collision between a commercial service vessel and a houseboat occurring on the Lake of the Ozarks?

I.A.

Should the Eighth Circuit be instructed to follow Supreme Court precedent on "navigability?"

The Eight Circuit has taken an unwarranted and unjustifiably narrow view of admiralty jurisdiction in direct conflict with this Court's decisions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Foremost v. Richardson*, 457 U.S. 668 (1982); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *The Montello*, 87 U.S. (20 Wall.) 430 (1874). The Eighth Circuit's requirement of actual, present, interstate commercial shipping as a prerequisite to admiralty jurisdiction is in direct conflict with the well-established "capability of use" rule set forth in this Court's precedents.

In *Livingston v. United States*, 627 F.29 165, 170 (8th Cir. 1980), the Eighth Circuit ruled that "the concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping," relying on *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972). *Livingston* misunderstood *Executive Jet* which imposes no such restriction on the exercise of jurisdiction. To impose a current, interstate, commercial activity requirement would make the decision to exercise jurisdiction overly fact specific. In this case, The Lake of the Ozarks was clearly navigable prior to the erection of the dam which, under the terms of its license, can be removed at any time by order of FERC. To establish a jurisdictional test of the navigability of a waterway subject to the temporary condition of interstate navigation provides no uniformity of treatment of vessel owners so critical to the admiralty jurisdiction.

This waterway was within the admiralty jurisdiction in 1930. *State of Missouri v. Union Electric Light & Power*

Co., 42 F.2d 692 (W.D.Mo. 1930). It was within the admiralty jurisdiction in 1957 and another dammed river was navigable in 1968. *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957); *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). In these prior Eighth Circuit decisions, the court recognized the long line of Supreme Court authority supporting the exercise of admiralty jurisdiction over these waterways. In *Loc-Wood*, the court stated:

> 'The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the State of Missouri but *is navigable within the admiralty and maritime jurisdiction of the United States. Propeller Genesee Chief*, 12 How. 443, 457, 13 L.Ed. 1058; *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31, 41, 62 S.Ct. 886, 86 L.Ed. 1246, 46 U.S.C.A. §188." (emphasis added) (245 F.2d 306, 307).

In *George*, a limitation action proceeding in admiralty, the same Eighth Circuit held:

> "If the river was navigable prior to construction of the dam, it continues to be considered as a navigable stream. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118, 41 S.Ct. 409, 65 L.Ed. 847 (1921)." (402 F.2d 977, 978).

The cases cited by the Eighth Circuit in its earlier decisions reflect the accurate test of navigability within the admiralty jurisdiction. In 1980, a panel of the Eighth Circuit departed from the Circuit's previous course and issued its opinion in *Livingston* contrary to the opinions of other

panels in *Loc-Wood* rendered in 1957, and *George*, in 1968. Apparently to cure the defect posed by *Livingston* of one panel contradicting prior decisions of separate panels, in *Three Buoys*, the Court at n.5 stated:

> As a matter of Court procedure, a panel cannot overrule a prior panel opinion of this court. For that reason, this opinion has been circulated to the court *en banc*, and the court *en banc* has approved it. (921 F.2d 775, 779).

This Court should require the Eighth Circuit to return to its earlier posture and follow controlling Supreme Court precedents, and should summarily reverse the Eighth Circuit on the test of navigability used in *Three Buoys*.

I.B.

In the face of contrary Legislative statements, can the Eighth Circuit restrict the jurisdiction of the federal courts solely because of actions of the Executive Branch explicitly not intended to restrict federal jurisdiction?

The Eighth Circuit determined that there was no admiralty jurisdiction because there was no present capability of interstate navigation on the Lake of the Ozarks apparently due only to the presence of the Bagnell Dam. Three Buoys submits that this is an incorrect position for the Judicial Branch of the United States Government to take in the face of express Executive and Legislative statements that the waterway remains navigable as it was historically and that the dam is temporary and subject to removal at the pleasure of the United States. The Judicial Branch cannot cavalierly ignore Legislative and Executive recognition of the navigability of this waterway.

As noted above, the FERC license under which the dam exists specifically reserves to the United States the right to require the removal of the dam, the right to construct necessary facilities for navigation, the right to use all water necessary for navigation, and the right to terminate the license. The license specifically declares that the Osage River is a navigable waterway of the United States affecting the interests of interstate or foreign commerce. The United States Coast Guard retains jurisdiction to inspect passenger excursion vessels but has delegated some of its primary authority to Missouri officials. If the Coast Guard did not have such authority, it could not delegate to Missouri. These departments of the Executive Branch, as well as the United States Army Corps of Engineers, recognize continued federal interests in navigation on the Lake of the Ozarks.

Congress has also designated this waterway as navigable. Congress has declared that the waterway is navigable far upriver of the accident site. *See*, 33 U.S.C. §41. Moreover, in the original Act incorporating this land into the United States, Congress specifically declared that the navigability at the time of incorporation would remain in perpetuity. Pursuant to 33 U.S.C. §10, all navigable waters in the former Territories of Orleans and Lousiana shall be and forever remain public highways. Missouri is within the former Territories of Orleans and Louisiana. Pursuant to §15 of the Organic Laws, Territory of Missouri, Act of Congress, June 4, 1812, at 95, 2 U.S.Stat. 743:

> "... The Mississippi and Missouri Rivers, and the *navigable waters flowing into them, and the carrying places between the same*, shall be common highways and forever free to the people of the said territory and to the citizens of the United

> States, without any tax, duty or impost therefor." (emphasis added).

Pursuant to §2 of the Enabling Act, Act of Congress, March 6, 1820, 22 U.S.Stat. 545, which authorized the people of Missouri to form a government and be admitted to the Union:

> ". . . the river Mississippi, and the navigable rivers *and waters leading to the same,* shall be common highways, and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost or toll therefor imposed by the said State."

These provisions cannot be overlooked and ignored by the Eighth Circuit in determining whethher the Judicial Branch will give effect to the Limitation Act, a Congressional action intended to address issues related to navigation on waters within the federal jurisdiction. This Court should clarify the purposes of the congressional actions and the Excutive's exercise of jurisdiction over these waters by correcting the Eighth Circuit's affront to the other two branches of the Government.

I.C.

Should the conflict between the circuits on the requirement of "potential" versus "actual" navigability for admiralty jurisdiction be resolved to require only "potential" navigability?

As set forth in Section I.A. above, this Court has long held that "potential" or "historical" navigability is the only requirement for admiralty jurisdiction. There is now a schism between the circuits which should be re-

solved. The Sixth Circuit, in *Finneseth v. Carter,* 712 F.2d 1040, 1045 (6th Cir. 1983) stated:

> "No Supreme Court case imposes the requirement that navagability only exists, for purposes of admiralty jurisdiction, if the lake or river is currently or presently being used as a highway for interstate commerce. This requirement has been imposed, however, by the Eighth Circuit, despite the contrary language of futurity, such as "susceptibility," "capability," and "may be" conducted or carried on, in early Supreme Court cases."

The focus on the potential or historical view of navigability, rather than the present actual use, has also been acknowledged in *Sanders v. Placid Oil Co.,* 861 F.2d 1374 (5th Cir. 1988). The Fifth Circuit cited *Finneseth* with approval for the proposition that reference to Army Corps permit requirements was significant in finding navigability. The same focus has been adopted by district courts within the Second and Fourth Circuits. *See, Sawczyk v. United States Coast Guard,* 499 F. Supp. 1034 (W.D.N.Y. 1980); *Hartman v. United States,* 522 F. Supp. 114 (D.S.C. 1981).

The Eighth Circuit, however, has taken an overly restrictive view of navigability. Essentially, the Eighth Circuit takes a snapshot of commerce at the instant of the event and uses the existence or non-existence of interstate commerce at that moment as the test for navigability. In setting forth its test, the Eighth Circuit, in *Three Buoys,* acknowledges the criticisms of its test by the Sixth Circuit and invites this Court's guidance:

> "Thus, despite the criticisms expressed in *Finneseth v. Carter,* 712 F.2d 1041, 1045 (6th Cir.

> 1983), and until Supreme Court authority to the contrary, *Livingston* [*Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. den.* 450 U.S. 914 (1981)] remains controlling authority in this court for the determination of what is a navigable waterway. The standard is one of "contemporary navigability in fact." (note omitted) (921 F.2d 775, 778).

This Court should take this opportunity to clarify the definition of navigability in order (1) to provide the scope of coverage within the admiralty jurisdiction, (2) to give effect to the uniformity of protection to vessel owners and the predictability of results of operations for a vessel operator, and (3) to avoid an intensive fact-specific analysis for determining jurisdiction.

II. Do alternate jurisdictional bases, outside traditional admiralty jurisdiction, exist which permit a federal court to address a vessel owner's rights under the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*)?

II.A.

Should federal jurisdiction related to the Limitation of Liability Act (46 U.S.C.Appx. §§181 *et seq.*) specifically granted by the Congress be broadly construed?

The Eighth Circuit disregards the explicit Congressional mandate set forth in the plain and unambiguous language of the Limitation of Liability Act. 46 U.S.C. Appx. §§181 *et seq.* The Act specifically states that it applies to *all vessels used on lakes, or rivers or in inland navigation.* 46 U.S.C.Appx. §188. The use of the disjunctive in the listing shows a clear intent to provide protection to vessel owners far more broadly than applied by the

Eighth Circuit. Had the Congress intended to limit the breadth of the scope to the waters within the Admiralty and Maritime Jurisdiction, a simple reference to those waters would have sufficed. Rather, Congress explicitly used a much broader designation of waters covered by the Limitation Act in order to effect the protection to vessel owners within the United States.

The Eighth Circuit has misconstrued and misapplied the Limitation Act by ignoring the express language of the Act and improperly focusing on the locality of the event. The subject of the Limitation Act is vessel ownership. The Act is not limited by the situs of the injury: the particular waterway. *Richardson.* The Act regulates one incident of the status of vessel ownership: the liability for damage occurring without the owner's privity or knowledge. Congress' regulatory authority is not limited or defined by the admiralty jurisdiction of the federal courts. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

While the Limitation Act does not specify its Constitutional authority, there are several bases which have been recognized:

1. The Commerce Clause (Article I, Section 8, Clause 3);

2. The 'necessary and proper' clause (Article I, Section 8, Clause 18); and

3. The judicial power over admiralty and maritime matters (Article III, Section 2, Clause 1) (A-38).

The Limitation Act has passed Constitutional muster. This Court has explicitly held that the Congressional authority to enact the Limitation Act is "derived from the power to

regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction' " and the 'necessary and proper' clause. *The Hamilton,* 207 U.S. 398, 404 (1907); *Kaiser Aetna*; 3 *Benedict on Admiralty* §3, ppg. 1-29 (7th Ed. 1986). The Limitation Act is empowered pursuant to the Commerce Clause and has the breadth of application provided by the Commerce Clause. *Lord v. Steamship Company,* 102 U.S. 541 (1880); *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578 (1883).

The district court correctly recognized that the 1886 Amendment (Act of June 19, 1886, C.421, §4, 24 Stat. 79) made "the Act applicable to all vessels regardless of the purposes for which they were used." (A-36). Congress amended the Act specifically to encourage competition between water-borne transportation and the railroads and to encourage ownership of inland vessels to aid ship-building industries. *See Cong. Rec.,* 49th Cong., 1st Sess. 1108, 1111 (February 3, 1886). The invocation of the Commerce Clause power extends the effect of the limitation Act "to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce." *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942), cited in *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 282 (1981); *see also, Katzenbach v. McClung,* 379 U.S. 294 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942); *NLRB v. Jones,* 301 U.S. 1 (1937); *United States v. Darby,* 312 U.S. 100 (1941).

Once imbued with Constitutional authority, the statutes must be applied with due concern for Congressional intent. The federal courts have an "unflagging

obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). The Eighth Circuit cannot reject the grant of jurisdiction provided by 46 U.S.C.Appx. §185. Had Congress intended to limit the Act to vessels while they are exclusively within the admiralty jurisdiction, Congress could easily have so stated. Having recognized the Constitutional basis of this Act in the Commerce Clause, this Court should recognize the jurisdiction of the federal courts under 28 U.S.C. §§ 1331 or 1337 to give effect to the Congressional mandate.

The Eighth Circuit denied the essence of the Act as a Congressional Act when it concluded that the Act was merely a type of defense akin to a common state law defense. Limitation, as was recognized in the briefing in *Sisson*, is unavailable in state court. The right to limitation exists only by federal statute. The right is enforceable *only* in federal court. State courts, by statute (46 U.S.C.Appx. §185), rule of court (Rule F of the Supplemental Rules of the Federal Rules of Civil Procedure), and decisions of this Court (*Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871); *Ex Parte Green (The Aloha)*, 286 U.S. 437 (1932)) are incompetent to address the owner's right to limit and cannot act *in rem*. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927).

Congress has provided this right to vessel owners and has empowered the courts to hear litigation determining these rights under the Commerce Clause of the Constitution and have defined these rights in terms of the status of the party seeking to invoke these rights: a vessel owner. *See* 1 U.S.C. §3. With this broad definition of the authority invoked and the protection afforded, this Court should instruct the Eighth Circuit to give effect to the Limitation of Liability Act, as written.

II.B.

Does *Richardson v. Harmon*, 222 U.S. 96 (1911) recognize a jurisdictional basis for a federal court to handle a limitation action involving an accident not within the admiralty jurisdiction?

In the Court's grant of certiorari in *Sisson*, the Court specifically requested briefing of "whether or not the Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911)." *Sisson v. Ruby*, 497 U.S. ____, 110 S.Ct. 863 (Order of January 22, 1990). The parties and various amici curiae briefed the issue. Essentially, *Richardson* recognizes that the Limitation Act is not limited by the admiralty jurisdiction of the federal courts. Among the amici curiae were the United States of America and the Maritime Law Association of the United States. These parties addressed the purposes of the Limitation Act and the rationale in *Richardson*.

This Court found it unnecessary to address *Richardson* in its decision in *Sisson*. However, this Court can address *Richardson* in the context of this claim as noted by the Solicitor General in his amicus brief in *Sisson* wherein he stated:

> "In particular, courts have refused to apply the Limitation of Liability Act to claims arising from torts on non-navigable waters, even though such claims would seem to fall within *Richardson's* expansive interpretation of the debts and liabilities subject to the Act. n.16 (16 E.G., *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 878 F.2d 1096 (8th Cir. 1989) . . .) *Richardson* held that the situs of a tort in relation to the traditional bounds of maritime law was irrelevant to

> the application of the Act, and its reasoning does not recognize a distinction between torts occurring on land adjoining navigable waters and those taking place elsewhere." (Brief filed April 6, 1990 for United States as Amicus Curiae Supporting Respondents).

The Maritime Law Association also addressed the purpose of the Act and of *Richardson* by stating in part:

> "If it were argued that allowing limitation for claims having no significant relationship to traditional maritime activity is unnecessary for merchant marine interests, we would point out that one purpose of the Limitation Act 'was to encourage ship-building and to induce capitalists to invest money in this branch of the industry.' *Norwich, supra,* at 121. [*Norwich Company v. Wright,* 80 U.S. (13 Wall.) 104, at 121 (1871)]. The building of recreational craft is an important segment of the 'ship-building' industry today and, as discussed below, pleasure craft are clearly included in the Limitation Act." (Brief filed March 8, 1990 for the Maritime Law Association of the United States as Amicus Curiae Supporting Petitioner).

Richardson uncouples the Limitation Act from general admiralty jurisdiction. After *Richardson,* "[p]roceedings by vessel owners to limit their liability as permitted by [the Limitation Act] are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1 Benedict on Admiralty §225 (7th ed. 1986). See *Just v. Chambers,* 312 U.S. 383, 386 (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *The No. 6,* 241 F. 69

(2d Cir. 1917); *The Rochester,* 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross,* 8 F.2d 313 (D.Mass. 1923); *In re Highland Nav. Corp.,* 24 F.2d 582 (S.D.N.Y. 1927); *The Atlas No. 7,* 42 F.2d 480 (S.D.N.Y. 1930); *The Trim Too,* 39 F. Supp. 271, 273 (D.Mass. 1941); *In re Colonial Trust Co.,* 124 F. Supp. 73, 75 (D.Conn. 1954).

By contrast, the Eighth Circuit has implicitly rejected *Richardson* by holding that the Limitation Act applies only to the limit of admiralty jurisdiction on currently navigable waters. The Eleventh Circuit appears to agree. *Lewis Charters, Inc. v. Huckins Yacht Corp.,* 871 F.2d 1046 (11th Cir. 1989). Both the Eighth and Eleventh Circuits conflict with this Court's ruling in *Richardson* and with the Second Circuit and district court opinions from the First Circuit cited above. This Court should revisit *Richardson* and reassert the breadth of the Limitation Act.

Richardson holds that a vessel owner, when sued for liabilities as owner or operator of the vessel, is entitled to the protection Congress intended to provide whether traditional Admiralty jurisdiction exists or not. Three Buoys submits that this Court should reaffirm this basic holding of *Richardson* and the basic statement by the Congress by overruling the Eighth Circuit's decision.

CONCLUSION

For these reasons, this petition for certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the United States Court of Appeals for the Eighth Circuit and the matter should be remanded to the district court for appropriate disposition.

Respectfully submitted,

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